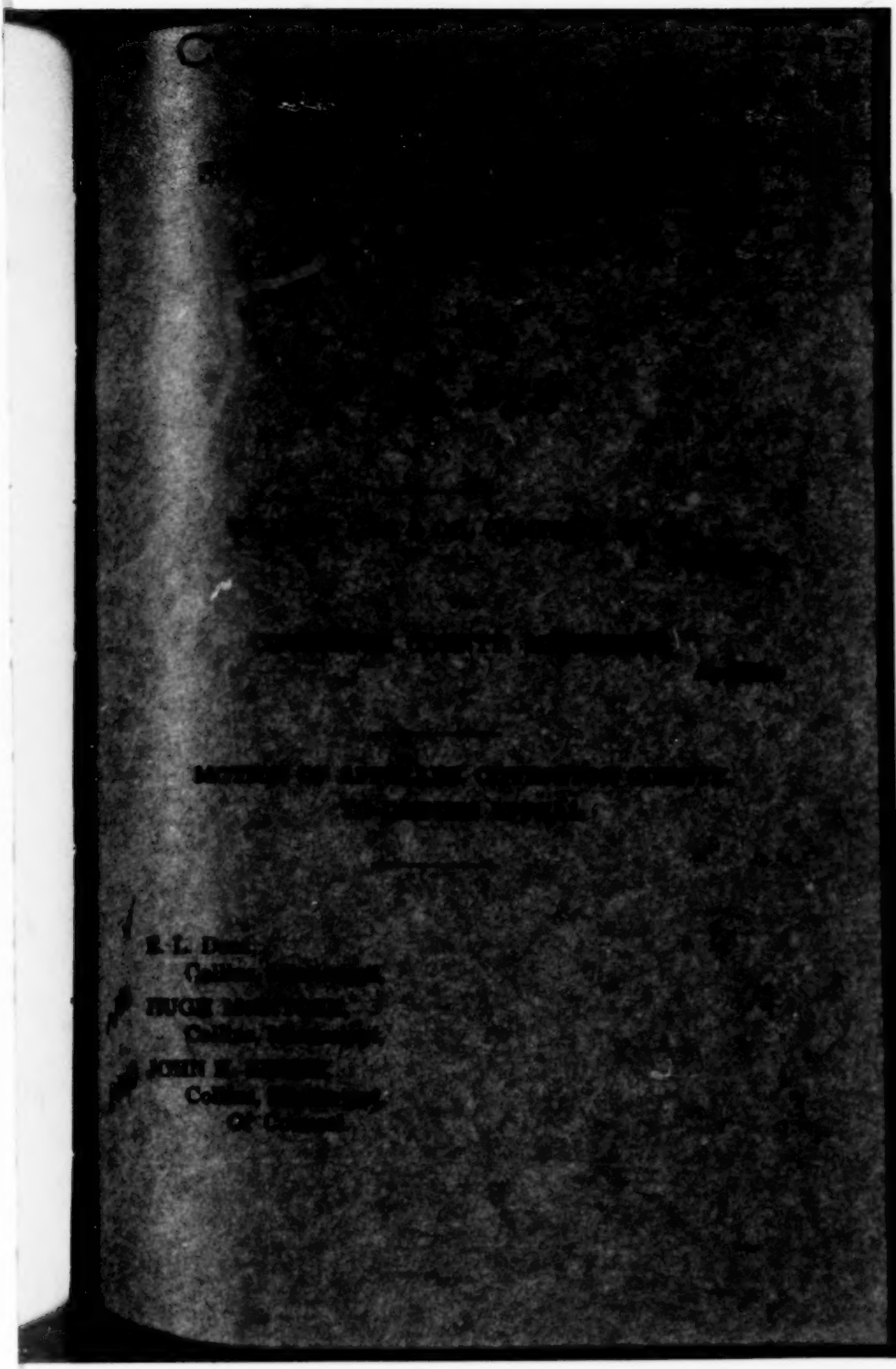

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

WILLMUT GAS & OIL COMPANY, ET AL.,
Appellants,

vs.

COVINGTON COUNTY, MISSISSIPPI,
Appellee

MOTION OF APPELLEE, COVINGTON COUNTY, TO DISMISS APPEAL

Pursuant to Paragraph 1 of Rule 16, there is herewith respectfully submitted to this court this motion to dismiss the appeal filed in this cause.

This case arose in the state courts of Mississippi as a result of the construction and maintenance of a natural gas pipeline by appellant and its predecessor in title, Public Service Corporation, over a Sixteenth Section of land (commonly known as school lands), in Covington County, Mississippi. The appellee, Covington County, filed suit to enjoin the operation of such pipeline by appellant's successor in title, United Gas Pipe Line Company, and to collect a reasonable rental for the use of the right-of-way by said pipe line for the period from February 20, 1934, to the date of institution of the action. The Chancery Court of Covington County, Mississippi, granted the injunction and awarded the appellee judgement in the amount of $285.00 against the appellant, and judgement in the amount of $275.00 against appellant's successor, for the use of said right-of-way during the period sued for.

The case was appealed to the Supreme Court of Mississippi, wherein it was held that under Section 2780, Mississippi Code of 1942, appellant and its successor could not be enjoined from the operation of the pipeline over and across said lands, for the reason that the statute referred to granted a right-of-way across school lands to such public service corporations. The court held "that in order that said statute comply with Sections 95 and 211 of the **Mississippi Constitution of 1890**, that the pipeline companies must pay a consideration, either at one time or installments of rent, for their right-of-way." Suggestion of error filed by appellant in the lower court not having sustained, appellant appeals to this court.

POINT I

This cause involves no substantial federal question of such nature as would confer jurisdiction upon this court herein. This case is simply one of the construction of a state statute, and its interpretation under the constitution of the state. The holding of the court below was simply that the appellant herein had not complied with Section 2780, of the Mississippi Code of 1942, in that appellant had not paid compensation for the use of the right-of-way involved, as required by said statute under the state constitution. Therefore, no substantial federal question exists. The decision of the state court was entirely upon a non-federal ground, based upon local law of the state of Mississippi, and therefore leaves no federal question open for determination by this court. Compare **Hunter v. McHugh**, 320 U. S. 222, 88 L. ed. 5, 64 S. Ct. 19.

Further, the federal question now sought to be maintained on this appeal was not passed upon by the court below, and therefore should not be considered on appeal in this court. **Blair v. Oesterlein Co.**, 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996. In the case of **McGoldrick, Comptroller of the City of New York, v. Compagnie Generale Transatlantique**, 309 U. S. 430, 60 S. Ct. 670, this court stated, "But it is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only is cases coming from the federal courts, that it considers

questions urged by a petitioner or appellant not pressed or passed upon in the courts below."

Appellant did not in the court below attack Section 2780, of the Mississippi Code of 1942, as being violative of the Federal Constitution, but rather urged the statute affirmatively therein. Therefore, appellant cannot now, for the first time in this court, obtain an appeal on the basis that said statute is violative of the Federal Constitution. In the case of **McGoldrick v. Compagnie Generale Transatlantique**, supra ,this court stated, "That this court, where the constitutionality of the statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." **Dewey v. Des Moines**, 173 U. S. 193, 19 S. Ct. 379, 43 L. Ed. 665; **Keokuk & Hamilton Bridge Co. v. Illnois**, 175 U. S. 626, 633, 20 S. Ct. 205, 208, 44 L. Ed. 299; **Whitney v. California**, 274 U. S. 357, 362, 363, 47 S. Ct. 641, 643, 644, 71 L. Ed. 1095; **New York ex rel. Cohn v. Graves**, 300 U. S. 308, 317, 57 S. Ct. 466, 469, 81 L. Ed. 666, 108 A. L. R. 721; **American Jurisprudence, On United States Courts**, Section 192.

POINT II

There is here no question of abrogation of contracts under the Federal Constitution. The Supreme Court of Mississippi, on May 7, 1906, in the case of **Moss Point Lumber Co. v. Board of Supervisors of Harrison County**, 89 Miss. 448, 42 So. 290, finally and emphatically adjudicated that such a lease (of Sixteenth Section lands), as is herein involved, was an agricultural lease only. Compare **Bernard v. Board of Supervisors of Jackson County**, 62 So. 2d. 576 (Miss. 1953). Therefore, upon the appellant purchasing the pipeline herein involved on February 20, 1934, (at a forced sale, and not under a voluntary conveyance), appellant is presumed to have known the law as existent at that time. See **Yazoo and M. V. R. R. v. Bolivar County**, 146 Miss. 30, 111 So. 581 (1927), and **Yazoo and M. V. R. R. v. Sunflower County**, 125 Miss. 92, 87 So. 417 (1921).

Appellant attempts to maintain an untenable position in this court, in that it contends first, that the Malichi Odom lease granted the right to construct and maintain a pipeline

over subject lands; and that any abrogation of that right constitutes an invasion of the constitutional rights of the appellant. On the other hand, appellant contends that the rights and easements as are herein involved never were vested in the Boards of Police, of Covington County, (now Boards of Supervisors), and therefore could not have been granted in any manner to appellant or its predecessor in title by such board. Such a position is contrary to logic.

POINT III

The holding in the state court in this case concerns matters of state law only, and amount at most to an alleged erroneous construction of a statute of the State of Mississippi by its own courts. Therefore no jurisdiction exists on certiorari to this court under the decision of **Neblett v. Carpenter**, 305 U. S. 297, 83 L. ed. 182, 59 S. Ct. 170, wherein a rehearing was denied in 305 U. S. 675, 83 L. Ed. 437, 59 S. Ct. 335.

The Supreme Court of Mississippi has consistently held, that leases of Sixteenth Section lands, such as the appellant herein claims title under, are merely leases for agricultural purposes, and none other. **Moss Point Lumber Company v. Board of Supervisors of Harrison County**, 89 Miss. 448, 42 So. 290, and followed in the case of **Pace et al. v. State ex rel. Rice, Atty. Gen., et al.** 191 Miss. 780, 4 So. 2d. 270.

The cases cited by appellant under Question II are not here involved, for the reason that in each of those cases a political subdivision of the State of Mississippi was claiming the easement in dispute, and the Court correctly held that property subjected to one public user could be used for another public purpose. The amount involved in the judgment below as against the appellant was in the sum of $285.00, which, it is with respect submitted, could not effect such result as to substantially wreck the operations and substantially confiscate the utitlity functions of the appellant within the rule of **City of Tulsa v. Southwestern Bell Tel. Co.**, 75 Fed. 2d. 343. Further, appellant has no standing in this court to challenge the provisions and effect of Section 2780, of the Mississippi Code, appellant's remote grantor having accepted the full benefits of said statute. See **Gandy v. Public Service Corporation**, 163 Miss. 187, 140 So. 687.

WHEREFORE, it is respectfully submitted that appellant has raised no substantial federal question to provide the necessary jurisdiction for appeal to this court, and therefore that said appeal should be by this court dismissed.

Respectfully submitted,

E. L. DENT

HUGH McINTOSH

JOHN K. KEYES

E. L. Dent,
Collins, Mississippi,
HUGH McINTOSH,
Collins, Mississippi,
JOHN K. KEYES,
Collins, Mississippi,
Of Counsel.

PROOF OF SERVICE

STATE OF MISSISSIPPI
COUNTY OF COVINGTON

Personally appeared before me the undersigned authority, the within named E. L. Dent, who having been by me first duly sworn on oath states that he is a member of the Bar of the Supreme Court of the United States and duly authorized on behalf of Covington County, Mississippi, as its attorney, to make this Motion in manner and form as filed, and that he has on this date caused to be mailed under registered cover in duly addressed envelopes, with postage prepaid, forty-four copies of the foregoing Motion to Dismiss Appeal to the Supreme Court of the United States, as follows: three to Willmut Gas and Oil Company, through its attorneys, Currie & Currie, Hattiesburg, Mississippi, Hannah, Simrall & Aultman, Hattiesburg, Mississippi, Green, Green & Cheney, 801 Plaza Building, Jackson, Mississippi; one to United Gas Pipe Line Company through its attorney, Honorable Ralph Avery, Plaza Building, Jackson, Mississippi; and forty copies to Honorable Harold B. Willey, Clerk of the Supreme Court of the United States; all having done on this the _____ day of October, 1954.

_____

Sworn to and subscribed before me, this, the _____ day of October, 1954.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:

_____